Supreme Court, U.S.
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IN THE
Supreme Court of the United States

ARIEL FRIEDLANDER,

Petitioner,

v.

PORT JEWISH CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Assuming the First Amendment creates a "ministerial exception" to the jurisdiction of the courts that forecloses a minister's access to the legal system for disputes with the minister's employer, what is the appropriate scope of that exception, particularly when the minister and her employer have chosen to enter into a written employment agreement and the dispute is merely contractual. The courts of appeal have been unable to agree on the appropriate standard for application of the ministerial exception despite nearly 40 years of considering this issue. Furthermore, the Supreme Court has not yet had occasion to set forth a clear standard. The resulting body of case law is conflicting, disjointed and confusing.

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PRELIMINARY STATEMENT

Petitioner, Ariel Friedlander ("Friedlander" or "Petitioner"), appeals the Decision of the Second Circuit affirming the final Decision, Order and Judgment of the United States District Court for the Eastern District of New York, United States District Judge Arthur D. Spatt, dismissing all claims set forth in Friedlander's Complaint against Respondent, Port Jewish Center ("Respondent"), for lack of subject matter jurisdiction.

OPINIONS BELOW

The September 30, 2000, Decision of the United States Court of Appeals for the Second Circuit, is reproduced at App. A, 1a.

The December 8, 2008 Decision of the United States District Court for the Eastern District of New York, is reproduced at App. B, 4a.

JURISDICTIONAL STATEMENT

The District Court declined to exercise subject matter jurisdiction over Friedlander's claims of breach of contract and breach of the covenant of good faith and fair dealing pursuant to the "ministerial exception," which was inappropriately applied in this instance. Subject matter jurisdiction existed there pursuant to 28 U.S.C. § 1332.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(1). The Second Circuit's opinion was filed on September 30, 2009.

STATEMENT OF THE CASE

The issue presented in this case is whether the Second Circuit erred in affirming the District Court's holding that it lacked subject matter jurisdiction to decide Friedlander's claims when the resolution of such claims would not entail an examination of religious doctrine, but would instead require only a determination as to whether Friedlander's alleged actions rose to the level of "gross misconduct" or "willful neglect of duty," as those terms were used in her written employment agreement with Respondent.

On December 17, 2007, Friedlander filed a timely action against her former employer, Port Jewish Center, alleging that, in terminating her employment, Respondent violated the terms of her written employment contract and the covenant of good faith and fair dealing. Respondent filed its motion to dismiss for lack of subject matter jurisdiction on March 24, 2008.

In a Memorandum of Decision and Order and Judgment dated December 8, 2008, United States District Judge Arthur D. Spatt granted Port Jewish Center's motion to dismiss the action in its entirety and directed the Clerk of Court to close the case. Friedlander filed her Notice of Appeal on January 5, 2008. On September 30, 2009, the Second Circuit affirmed Judge Spatt's dismissal.

STATEMENT OF FACTS

Friedlander entered into a written employment contract (the "Contract") with Port Jewish Center in or about May 2005 to be its Rabbi. The Contract provided for a term of employment of three years, beginning on July 1, 2005. Friedlander was promised an annual base salary of $84,000, plus a cell phone and automobile allowance of up to $1,000. Her base salary and allowance were to be increased each year by three percent.

The Contract further provided that Friedlander was to have "freedom of the pulpit" and that her employment could be terminated only "for gross misconduct or willful neglect of duty."[1]

On or about March 6, 2006, a group of congregants attended a meeting of Respondent's Board of Trustees to air their complaints about Friedlander. One of those congregants told the Board that if Friedlander was not fired, he and others would leave the congregation.

On or about July 5, 2006, the President of Port Jewish Center sent Friedlander a list of grievances. Respondent terminated Friedlander's employment on or about July 9, 2006.

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[1] The contract also permitted termination in the event Friedlander was physically unable to perform her duties, but that is not at issue here.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit first formally announced the "ministerial exception" over 30 years ago.[2] The courts of appeal have struggled to clearly establish the bounds of the rule ever since. "Among the circuits and lower courts, it is vague and imprecise as to how the three-decade old ministerial exception applies and when it is appropriate to utilize the exception."[3] In fact, the courts of appeal cannot even agree on the Constitutional underpinnings for the exception[4] or the threshold question of to whom the exception applies,[5] but instead "have consistently struggled to decide whether or not a particular employee is functionally a minister."[6]

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[2] *See Rweyemamu v. Cote*, 520 F.3d 198, 206 (2nd Cir. 2008) (stating that the Fifth Circuit decision *McClure v. Salvation Army*, 460 F.2d 553, was the first case to address the ministerial exception).

[3] Leslie K. Harrach, *The New Jersey Supreme Court Allows Constitutionally Forbidden Entanglement of the State in a Church/Minister Employment Relationship in Contradiction of the Ministerial Exception*, 5 Rutgers J.L. & Religion 5.

[4] *See* Gregory A. Kalscheurm, S.J., *Civil Procedure and the Establishment Clause*, 17 Wm. & Mary Bill of Rts. J. 43 (While many courts have recognized and applied the ministerial exception, they have adopted a range of positions regarding the constitutional foundations for the doctrine).

[5] *See* Harrach, *supra* ("The state and circuit courts that have considered whether to apply the ministerial exception have employed differed tests to determine which employees constitute a 'minister' under the exception").

[6] *Rweyemamu*, 520 F.3d at 208 (internal quotations omitted).

The interests at stake in this inquiry are of the "highest order."[7] The Supreme Court, however, has not yet had occasion to rule upon the scope of the ministerial exception, or even its validity.[8] Review by the Supreme Court is therefore necessary to resolve the conflict and confusion existing among the decisions of the courts of appeal and to bring clarity to an area of the law that affects two interests of the highest order, employment rights and the freedom of religion.

The Second Circuit's recent holding in *Rweyemamu v. Cote*, and its application in the present case to dismiss Petitioner's claims, represent an extremely broad interpretation of the ministerial exception, which conflicts with the decisions of its sister Circuits. Friedlander's breach of contract claim was dismissed despite the fact that it could be determined upon solely secular grounds, given that Friedlander's contract provided that her employment could be terminated only for "gross misconduct" or "willful neglect of duty." The Second Circuit's decision thus effectively insulates a religious organization's employment-related decisions

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[7] *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 at 460 (D.C. Cir. 1996) ("This case presents a collision between two interests of the highest order."); *see also EEOC v. Roman Catholic Diocese*, 48 F.Supp.2d 505, 507 (E.D.N.C. 1999) ("The Court is confronted with the clash of two deeply held American convictions."); Janet S. Belcove-Smith, *Ministerial Exception and Title VII Claims*, 2 Nev. L.J. 86.

[8] *See Hankins v. New York Annual Conference of the Methodist Church*, 516 F.Supp.2d 225, 228 (E.D.N.Y. 2007); *Combs v. Cent. Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 347 (5th Cir. 1999).

from review by a secular court regardless of whether religious doctrine is implicated.

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING THE SCOPE AND APPLICABILITY OF THE MINISTERIAL EXCEPTION

The Circuits have not agreed upon the scope or applicability of the ministerial exception.[9] While the Ninth Circuit has taken a narrow view of the exception, the Fifth, Sixth and Seventh Circuits have taken similar and substantially more expansive views. The Second Circuit's decision in *Rweyemamu v. Cote* takes a slightly more moderate stance than do the Fifth, Sixth and Seventh Circuits. The balance of the courts of appeal lie somewhere in between.

A. *Definition Of "Minister"*[10]

The courts of appeal have been unable to agree on a definition of "minister" for purposes of the ministerial exception.[11] Some courts look to the primary duties of the individual in question to determine whether the exception applies. Specifically, these courts have looked at "whether (the plaintiff's) primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or

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[9] *See Rweyemamu*, 520 F.3d at 208; Harrach, *supra*.

[10] There is no dispute in the instant case that Petitioner is a "minister' under any existing definition of that term.

[11] *See Rweyemamu*, 520 F.3d at 208.

participation in a religious ritual and worship."[12] The Second Circuit expanded this test, first criticizing it as "too rigid," and then stating that even "a lay employee's relationship to his employer may be so pervasively religious that judicial interference could run afoul of the Constitution."[13] On the other end of the spectrum, the Ninth Circuit refused to apply the ministerial exception when the plaintiff's "duties (didn't) go to the heart of the church's function . . . ."[14]

These definitions of minister represent significant differences as to the breadth of the exception. The Second and Ninth Circuit's definitions are particularly divergent. The Second Circuit's standard encompasses not only all employees primarily engaged in religious duties but also some lay employees, whereas the Ninth Circuit's standard does not even encompass all employees with primarily religious duties.

After nearly 40 years of wrestling with this issue, the courts of appeal have not yet settled on the threshold

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[12] *Catholic Univ. of Am.*, 83 F.3d at 463; *Rayburn v. General Conference of Seventh Day Adventists Conference of Seventh Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *see also Petruska v. Gannon Univ.*, 462 F.3d 294 (3rd Cir. 2006) (looking to performance of "spiritual functions").

[13] *Rweyemamu*, 520 F.3d at 208; *see also The Ministerial Exception to Title VII*, 121 Harv. L. Rev. 1776, 1787 (criticizing this test because "courts face difficulty in distinguishing religious activities from nonreligious activities").

[14] *EEOC v. Pacific Press Publishing Ass'n.*, 676 F.2d 1272, 1278 (9th Cir. 1982).

inquiry of who qualifies as a minister. It is therefore not surprising that the courts of appeal are also divided regarding the appropriate standard to apply once the exception has been deemed applicable.

B. *Applicable Standard Once Plaintiff Is Determined To Be A Minister*

The standards set forth by the courts of appeal are divergent, often confusing, and in direct conflict with one another on a variety of issues. One major difference among the Circuits is whether or not any inquiry should be performed at all beyond establishing the plaintiff qualified as a "minister" and the decision in question was employment-related. Additional differences exist concerning the appropriateness of considering the remedy sought by the plaintiff, the motivating factors for the decision, and the form of inquiry that would be required to resolve the case.

The Fifth, Sixth and Seventh Circuits have held that a suit should be dismissed once it is established that the plaintiff is a minister suing the religious organization that employs him or her. The Fifth Circuit has ruled that it is "inherently coercive" to look into employment discrimination claims against a religious organization even if the discrimination was "purely nondoctrinal."[15] In *Lewis v. Seventh Day Adventists*, the Sixth Circuit set forth a similar standard, stating, "We conclude the First Amendment bars civil courts from reviewing decisions of religious judicatory bodies relating to the

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[15] *Combs*, 173 F.3d at 350.

employment of clergy."[16] Similarly, the Seventh Circuit held that "the (ministerial) exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. The church need not, for example, proffer any religious justification for its decision...."[17] This standard may also be embraced by the Eleventh Circuit, but it is unclear.[18] These decisions, however, are not in accord with those of their sister circuits.

The D.C., First, Fourth, Ninth and Tenth Circuits have established considerably narrower bounds for the ministerial exception. The D.C. Circuit will permit a case to proceed if there is "some form (of permissible) inquiry . . . and some form (of permissible) remedy."[19] The First and Tenth Circuits look to whether or not the dispute "will turn upon the resolution of controversies

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[16] 978 F.2d 940, 942; *see also* Sara Prose, *Constitutional Law – The Ministerial Exception Exists in Michigan as a Valid Defense in Employment Discrimination Suits*, 87 U. Det. Mercy L. Rev. 41, 42 (The Sixth Circuit ruled the ministerial exception applies when two prongs are met: (1) the employer is a religious institution, and (2) the employee is a ministerial employee).

[17] *Alicia-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003).

[18] *See Gelligton v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000) ("Investigation by a government entity into a church's employment of its clergy would *almost always* entail excessive government entanglement . . .").

[19] *Minker v. Baltimore Annual Conference*, 894 F.2d 1354, 1360 (D.C. Cir. 1999).

over religious doctrine and practice."[20] The Fourth Circuit has permitted an action to proceed where "it does not involve the church's spiritual functions."[21] The Ninth Circuit has established yet another test, asking whether or not "the character of the defense will require a jury to evaluate the reasonableness of the religious practices followed (by the defendant)."[22]

The Second Circuit has yet to set forth a clear test for the resolution of this issue. Just last year, in *Rweyemamu*, the Court declined to "delineate the boundaries of the ministerial exception."[23] In the present case, however, the Second Circuit affirmed the dismissal of the Petitioner's claim that she was improperly terminated when her written employment contract permitted termination only for "gross misconduct or willful neglect of duty." Many jurisdictions require an element of intent for a finding of gross misconduct.[24]

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[20] *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989); *see also Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002) (asking whether or not the dispute is "rooted in religious belief").

[21] *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

[22] *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999).

[23] 520 F.3d at 209.

[24] *See, e.g., Boudreaux v. Rice Palace, Inc.*, 491 F. Supp.2d 625, 633 (W.D. La. 2007) (citations omitted) ("The term 'gross misconduct' has generally been understood to include misconduct that is 'intentional, wanton, willful, deliberate,

(Cont'd)

Given that Friedlander's intent can be evaluated on purely secular grounds, the Second Circuit's ruling in this case essentially holds that any employment-related action taken by a religious institution is beyond review. Furthermore, the dismissal of Friedlander's claims is in conflict with the Third Circuit's ruling in *Petruska*, in which the Court held that "On its face, application of state contract law does not involve government-imposed limits on [defendant's] right to select its ministers . . ."[25] The decision at issue is also in conflict with the rulings of the D.C. Circuit Court and the New Jersey Supreme Court, which respectively permitted employment-related claims to go forward against religious institutions on theories of breach of an oral contract and breach of implied contract.[26]

(Cont'd)
reckless or in deliberate indifference to an employer's interest.'"); *Dailey v. Bd. of Review*, 214 W. Va. 419, 423, 589 S.E.2d 797 (2003) (defining gross misconduct as "misconduct consisting of willful destruction of his employer's property; assault . . . ; reporting to work [intoxicated]. . . ; reporting to work under the influence of any controlled substance; arson, theft, larceny, fraud or embezzlement in connection with his work. . . ."); *Giles v. District of Columbia Dep't of Employment Services*, 758 A.2d 522, 525 (D.C. 2000) (referring to D.C. Code § 46-111(b)(1), which lists as examples of gross misconduct sabotage, unprovoked assault or threats, arson, theft, dishonesty, insubordination, repeated disregard of reasonable orders, intoxication, use or possession of a controlled substance, willful destruction of property, and repeated absence or tardiness following warning).

[25] 462 F.3d at 310.

[26] *See Minker*, *supra* (permitted claim to proceed based upon an alleged breach of an oral contract to provide the plaintiff
(Cont'd)

C. *Factors To Be Considered When Applying The Standard*

The division among the courts of appeal runs deeper than just the nature of the inquiry. The split extends to the factors that should be considered as well. For instance, the lower courts disagree as to the relevance of the remedy sought by the plaintiff.[27] In *Bollard*, the Ninth Circuit considered it relevant that the plaintiff requested only money damages, but not reinstatement. The court perceived equitable relief as more troublesome because it could result in "continuing court surveillance."[28] The D.C. Circuit agreed, stating in *Minker* that if "the remedy would be limited to the award of money damages, we see no potential for distortion of church appointment decisions."[29] This is in direct contrast to *Kraft*, which expressly held that the form of the remedy sought is irrelevant.[30]

(Cont'd)

with a congregation suited to his training and skills); *McKelvey v. Pierce*, 800 A.2d 840 (N.J. 2002) (permitted claim to proceed based upon an alleged breach of an implied contract not to force the plaintiff, who was a priesthood candidate being trained in a seminary, to receive his education in a hostile work environment).

[27] Here, Petitioner seeks money damages.

[28] 196 F.3d at 950.

[29] 894 F.2d at 1360.

[30] *See Kraft v. The Rector, Churchwardens and Vestry of Grace Church in New York*, 2004 WL 540327, 5 (S.D.N.Y. 2004) ("Under a free Excerise Clause analysis, Plaintiff's distinction between a claim for damages and a claim for reinstatement is irrelevant").

Courts have also disagreed as to whether the purported reason for termination is relevant. The Ninth Circuit found this to be the central issue for determining the applicability of the ministerial exception.[31] The D.C. Circuit has asked whether the court would be forced to "choose between . . . competing religious views."[32] Each of these decisions is in conflict with the Seventh Circuit's holding in *Alicia-Hernandez*, in which the Court approvingly cited a Fourth Circuit case for the proposition that "the (ministerial) exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decisions."[33] Here, as argued before the Second Circuit, the reasons for Petitioner's termination are critical in that the parties' written contract provides limited bases for termination, which can be evaluated on purely secular grounds.

The courts of appeal are divided as to whom the ministerial exception is applicable, what the scope of the exception is when the plaintiff is a "minister," and how to determine whether a particular case falls within that scope. The Supreme Court should thus grant certification in order to resolve these conflicts among the courts of appeal and bring clarity to an area of law that touches upon two of the most fundamental and important legal principles, the freedom of religion and employment rights.

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[31] *See Bollard*, 196 F.3d at 950.

[32] *Catholic Univ. of Am.*, 83 F.3d at 466.

[33] 320 F.3d at 703.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

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